

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

STEPHEN LIEBB,

No. C 04-4213 CW (JL)

Plaintiffs,

v.

**ORDER DENYING DISCOVERY  
MOTIONS (Docket Numbers 19, 20, 23,  
24)**

JILL BROWN, WARDEN,

Defendant.

**Introduction**

The district court (Hon. Claudia Wilken) referred six pending discovery motions and all further discovery motions related to this habeas petition to this Court. The discovery motions have been separated to simplify the analysis. The Court denies the following four motions: 1) Respondent's Objection to the Discovery Order (Docket No. 19), 2) Petitioner's Request for Additional Time to Supplement the Record and Request for Additional Discovery (Docket No. 20), 3) Respondent's Request to Strike New Claims (Docket No. 23), and 4) Petitioner's Request for Judicial Notice (Docket No. 24).

**Factual Background**

Petitioner Stephen Liebbs, a prisoner of the State of California incarcerated at San Quentin State Prison, filed a pro se petition for a writ of habeas corpus on October 5, 2004. The petition challenges the constitutional validity of his July 17, 2003 parole suitability

1 hearing before the Board of Prisoner Terms (now known as the Board of Parole Hearings)  
2 and of the procedures the Board of Prisoner Terms relies on to grant or deny parole to  
3 prisoners serving indeterminate sentences for murder. This Court is familiar with the  
4 factual background of this case; therefore, an extensive factual history will not be included.

### 5 **Procedural History**

6 This Court is also familiar with the extensive procedural background preceding these  
7 motions; therefore, this Court will not discuss the procedural history in detail. For purposes  
8 of this order, the following dates are most relevant: On May, 30, 2007 (ninety days after  
9 Order, March 17, 2007, Docket No. 29) the district court referred six pending discovery  
10 motions and all further discovery motions to this Court. (Order, May 30, 2007, Docket No.  
11 31). The six pending motions referred to this Court are: 1) Respondent's Objection to the  
12 Discovery Order (Docket No. 19), 2) Petitioner's Request for Additional Time to File a  
13 Request to Expand the Record and for Further Discovery (Docket No. 20), 3) Petitioner's  
14 Request to Expand the Record and Request for Additional Discovery (Docket No. 21), 4)  
15 Respondent's Request to Strike New Claims (Docket No. 23), 5) Petitioner's Request for  
16 Judicial Notice (Docket No. 24), and 6) Petitioner's Motion to Expand the Record (Docket  
17 No. 27). This Court then filed notice to all parties setting the hearing date for the motions  
18 on July 25, 2007. (Clerk Notice Mot. Hr'g, Docket No. 32).

19 Liebb then filed a motion to be transported to the hearing which was subsequently  
20 denied by this Court. (Petitioner's Motion to be Transported to Hearing, Docket No. 34;  
21 Order, June 13, 2007, Docket No. 33). There was then an exchange between this Court  
22 and Liebb discussing compliance with Civil Local Rule 3-4(a-d). (Petitioner's Motion to be  
23 Relieved from Compliance with Civil Local Rule 3-4(a-d), Docket No. 36; Order, Docket No.  
24 37; Petitioner's Response to Order, Docket No. 38).

### 25 **Discussion**

#### 26 1.) Respondent's Objection to the Discovery Order (Docket No. 19)

27 In this motion Respondent objects to Judge Wilken's August 24, 2005 order granting  
28 Liebb leave to "proceed with limited discovery" as outlined by the court. (Order, 4, August

24, 2005, Docket No. 8). The order directs Respondent to provide Liebb with the “statements of decisions for all parole suitability hearings held during the year prior to Petitioner’s 2003 parole suitability hearing for all life-term prisoners convicted of one count of first-degree murder.” *Id.* It also directs Liebb to file a motion to supplement the record within thirty days of his receipt of the discovery materials or else the court will not accept a request to supplement the record. *Id.* at 8.

### **This Motion**

After Judge Wilken’s August 24th Order, Respondent filed two motions, for leave to file a supplemental answer and to stay the court’s discovery order. (Respondent’s Motion for Leave to File Supplemental Answer, Docket No. 9; Respondent’s Motion to Stay August 24, 2005 Order, Docket No. 10). On September 27, 2005, Judge Wilken granted Respondent’s motion to stay the August 24, 2005 discovery order pending the court’s consideration of Respondent’s supplemental answer. (Order, October 27, 2005, Docket No. 14). After reviewing Respondent’s supplemental answer, Judge Wilken filed a second order on March 21, 2006, lifting the stay of the court’s August 24<sup>th</sup> discovery order. (Order, March 21, 2006, Docket No. 17). Respondent had alleged within its supplemental answer that the court lacked subject matter jurisdiction over the petition and therefore the case should be dismissed. (Respondent’s Supplemental Answer, Docket No. 13). However, the court determined that it does have subject matter jurisdiction over the petition and denied Respondent’s request to dismiss the petition. (Order, March 21, 2006, Docket No. 17). The court re-ordered Respondent to comply with the court’s August 24, 2005 order, granting Liebb limited discovery as outlined by the court. *Id.*

### **Legal Analysis**

Respondent’s motion before this Court is an objection to Judge Wilken’s August 24, 2005 order granting Liebb limited discovery of the Board of Prison Terms’ (Board) decisions for all parole suitability hearings held during the year prior to Petitioner’s 2003 parole hearing for all life-term prisoners convicted of one count of first-degree murder. (Order, 4, August 24, 2005, Docket No. 8). Respondent asks the court to decide the case without,

1 “any further submissions or consideration of the discovery.” (Respondent’s Objection to  
2 Discovery Order, 1, Docket No. 19).

3       Once an order is entered in the record, a court can only set it aside or change it if a  
4 party moves to do so under Rule 59 or Rule 60 of the Federal Rules of Civil Procedure or  
5 by making a motion for reconsideration. *Mayo v. Dean Witter Reynolds, Inc.* 258 F.  
6 Supp.2d 1097, 1103. Furthermore, Rules 59 and 60 of the Federal Rules of Civil  
7 Procedure do not apply unless a final judgment has been entered, and therefore they are  
8 not applicable to this case. F.R.C.P. 59, 60. A motion for reconsideration is guided by the  
9 requirements set forth in Civil Local Rule 7-9. Before entry of judgment a party can request  
10 leave to file a motion for reconsideration of an order on any of the following three grounds:  
11 1) a material difference in fact or law existed at the time the order was issued which wasn’t  
12 presented to the court, 2) the emergence of new material facts or a change of law occurred  
13 which didn’t exist at the time the order was entered, or 3) a manifest failure by the court to  
14 consider material facts or legal arguments. ND Civil Local Rules 7-9(b). A party may not  
15 make a motion for reconsideration without leave of the court to file. *Id.* at 7-9(a).

16       Accordingly, since Respondent has failed to state grounds for the objection, this  
17 Court assumes Respondent is moving for leave to file a motion for reconsideration.  
18 Additionally, since Respondent has not stated any new material facts or a change of law,  
19 nor has it stated any fact or law that the court did not consider which existed at the time of  
20 the order, this Court is to further assume Respondent is moving for leave to file a motion for  
21 reconsideration based on Civil Local Rule 7-9(b)(3). *Id.* Civil Local Rule 7-9(b)(3) allows a  
22 party to move for reconsideration of a court order based on a manifest failure by the court  
23 to consider material facts or legal arguments which were presented to the court. *Id.*

24       Habeas petitioners in federal court under 28 U.S.C. § 2254 are not entitled to  
25 discovery as a matter of right. *Bracy v. Gramley*, 520 U.S. 899, 904 (1997). According to  
26 Rule 6(a) of the Rules Governing § 2254 cases, “a judge may, for good cause, authorize a  
27 party to conduct discovery under the Federal Rules of Civil Procedure and may limit the  
28 extent of discovery” as the judge sees fit. 28 U.S.C.A. foll. § 2254. In the case of *Bracy v.*

1 *Gramley*, the Supreme Court found that petitioner had good cause for discovery under 28  
2 U.S.C. § 2254 where the court had reason to believe the petitioner could demonstrate that  
3 he was entitled to relief. *Bracy*, 520 U.S. at 908-09.

4 Judge Wilken stated within her order that she found good cause to grant leave to  
5 proceed with limited discovery. (Order, August 24, 2005, Docket No. 8). Liebb alleges that  
6 the Board invariably categorizes all life-term crimes as exceptional in order to deny parole  
7 and such a policy is in violation of his due process rights. In order to prove his accusation,  
8 Liebb requested discovery of all parole decisions by the Board of life-term prisoners  
9 between 2000 and 2003. *Id.* at 3. The court believed Liebb's request was too broad since  
10 Liebb is not similarly situated to every life-term prisoner who had parole suitability hearings  
11 between those dates. *Id.* at 4. However, the court granted Liebb limited discovery as a  
12 starting point to determine whether Liebb could demonstrate good cause to be entitled to  
13 additional discovery. *Id.* The court suggested that if Liebb were to find a significant trend  
14 within the limited discovery materials that all or a significant majority of prisoners were  
15 denied parole due to the exceptional nature of their commitment offenses then Liebb might  
16 be able to prove his entitlement to further discovery. *Id.*

17 California Penal Code § 3041 instructs the Board that it "shall normally set a parole  
18 release date" unless it determines that public safety requires a denial of parole. Cal. Penal  
19 Code § 3041 (West 2007). This mandatory language suggests a presumption that parole  
20 release will be granted. *Greenholtz v. Inmates of Nebraska Penal & Corr. Complex*, 442  
21 U.S. 1, 12 (1979). Accordingly, this presumption creates a constitutionally protected liberty  
22 interest for prisoners which cannot be denied without due process. *Board of Pardons v.*  
23 *Allen*, 482 U.S. 369, 376-78 (1987). In *Allen*, prisoners who were denied parole in the  
24 Montana State Prison brought a civil rights action against the State Board of Pardons and  
25 its chair for denying them due process in disregard of statutorily mandated criteria to  
26 determine a prisoner's parole suitability. The Montana statute at issue within the case  
27 creates a presumption, similar to the California Penal Code § 3041, through the use of  
28 mandatory language ("shall") and therefore creates a liberty due process interest in parole

1 release. *Id.* at 369. Accordingly, since California's parole system is similar to Montana's  
2 system as described in *Allen*, Liebb has a federal protected liberty interest and a right to  
3 due process if his parole hearing was not guided by the mandatory language of the  
4 California Penal Code § 3041 and California Code of Regulations §§ 2400 - 2411.

5 Respondent contends that the Board's denial of Liebb's 2003 parole suitability was  
6 appropriate because there was 'some evidence' to support the Board's decision. By  
7 pointing to the case of *Jancsek v. Oregon Bd. of Parole*, Respondent argues that the Board  
8 only needs to produce some justification for their parole denial in order to protect a  
9 prisoner's due process rights. *Jancsek v. Oregon Bd. of Parole*, 833 F.2d 1389, 1390 (9th  
10 Cir. 1987). However in *Jancsek*, the court goes on to say that the requirements of due  
11 process are satisfied by the production of 'some evidence' and "additionally, the evidence  
12 underlying the board's decision must have some indicia of reliability." *Id.* at 1390.

13 Therefore, the Board has to show evidence to support its finding. The finding must also be  
14 based on the statutorily mandated criteria of the California Penal Code and California Code  
15 of Regulations. If the Board based its decision on Liebb's parole suitability without looking  
16 at his specific case but rather made its decision based on the nature of his commitment  
17 offense in general, its decision on Liebb's parole suitability violates Liebb's due process  
18 rights.

19 Respondent contends the limited discovery has no relevance to Liebb's parole  
20 suitability hearing because the Board has discretion to render decisions on a case by case  
21 basis. This argument is the reason Liebb seeks the limited discovery ordered by the Court.  
22 Liebb claims the Board invariably categorizes all life-term murders as being particularly  
23 cruel and therefore uses the commitment crime in every parole hearing, to deny parole and  
24 violate prisoners' due process rights. If Respondent is contending that the Board acted  
25 appropriately in using its case by case discretion, then the limited discovery materials  
26 should illuminate its contention. However, if Liebb's allegation is correct, that the Board  
27 uses the commitment offense to deny parole uniformly instead of examining each case  
28

1 individually, then the discovery will support Liebb's claim for relief.

2       Additionally, Respondent relies on the recent California Supreme Court case of *In*  
3 *Re Dannenberg* to demonstrate that the Board's reliance on the commitment offense in  
4 denying parole does not violate prisoners' due process rights, but is within the broad  
5 discretion of the Board. *In re Dannenberg*, 34 Cal. 4th 1061, 1094 (2005); *cert. denied by*  
6 *Dannenberg v. Brown*, 546 U.S. 844, 126 S.Ct. 92, 163 L.Ed.2d 109, 74 USLW 3204  
7 (U.S. Cal. Oct 03, 2005) (NO. 04-10299). In the *Dannenberg* petition the prisoner who was  
8 committed for an indeterminate sentence for second degree murder challenged the Board's  
9 denial of his parole suitability hearing because the denial was primarily based on the nature  
10 of the murder itself. *Id.* The court held that the Board had discretion to point to the nature  
11 of the crime itself in its decision to deny a prisoner's parole. *Id.* at 1094-95. However the  
12 court also stated that "the Board must point to factors beyond the minimum elements of the  
13 crime for which the inmate is committed" in denying the prisoner's parole. *Id.* at 1071.  
14 Therefore, although the Board has broad discretion under California Penal Code § 3041 to  
15 determine the parole suitability of prisoners, if the Board solely relies on the minimum  
16 elements of a prisoner's commitment offense, it will infringe on that prisoners' due process  
17 rights.

18       Judge Wilken's August 24, 2005 order limiting discovery is appropriate in light of  
19 Liebb's allegations that his due process and equal protection rights were violated by an  
20 unconstitutional Board policy. If Liebb finds all or a majority of the Board's parole suitability  
21 denials for life-term prisoners convicted of one count of first-degree murder to have relied  
22 on the exceptional nature of the commitment offense, then Liebb might be able to argue  
23 that he is entitled to relief. This Court denies respondent's motion for reconsideration of the  
24 court's order granting Liebb limited discovery.

25 2.) Liebb's Request for Additional Time to Supplement the Record and Request for  
26 Additional Discovery (Docket No. 20)

27       On June 26, 2006, Liebb filed this motion as a response to Respondent's objection  
28 to Judge Wilken's discovery order and to request additional time to file a motion to  
supplement the record and request additional discovery. Liebb admits to having received  
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1 and inspected discovery materials from Respondent on June 21, 2006. Within the motion,  
2 Liebb notifies the court of his intention to file a motion to supplement the record with the  
3 discovery and request additional discovery. However, Liebb claims to need additional time  
4 to file the motions and requests an extension of the court's thirty day deadline. (See Order,  
5 August 24, 2005, Docket No. 8).

6 Nevertheless, on July 11, 2006, less than thirty days after Liebb received the  
7 discovery materials, he filed a motion to supplement the record and for leave to proceed  
8 with additional discovery. (See Petitioner's Request to Supplement Record & Request for  
9 Additional Discovery, Docket No. 21). Therefore, Liebb's request for additional time to file a  
10 motion to supplement the record and request additional discovery is denied as moot, since  
11 Liebb filed the motions within the appropriate time period and without need for additional  
12 time.

13 3) Respondent's Request to Strike New Claims (Docket No. 23)

14 Respondent asserts that Liebb made new claims within his 'six pages of substantive  
15 arguments' in his motion to request the court to expand the record and grant him additional  
16 discovery. (Respondent's Objection to Petitioner's Request to Supplement Record &  
17 Request for Additional Discovery, 3, Docket No. 23). Respondent asks the court to strike  
18 Liebb's new claims since they were not filed according to Rule 4 under Rules Governing  
19 Section 2254 cases. Rules Governing § 2254 Cases, Rule 4, 28 U.S.C. foll. § 2254. Liebb  
20 objected to Respondent's request to strike, on grounds that he raised no new claims  
21 besides the ones stated within his original petition. (Petitioner's Reply to Respondent's  
22 Objection for Further Discovery and Request to Strike New Claims, 5, Docket No. 24).

23 This Court denies respondent's request to strike Liebb's new claims as moot. It is  
24 apparent after reading Liebb's motion, that the 'six pages of substantive arguments' at  
25 issue in this motion are neither new nor different from Liebb's original claims in his petition.  
26 As summarized by Judge Wilken, Liebb's petition for writ of habeas corpus challenges the  
27 constitutionality of two things: 1) his parole suitability hearing before the Board of Prison  
28 Terms, and 2) the procedures the Board relies upon to grant or deny parole to prisoners



1 serving indeterminate sentences for murder. (See Petitioner's Reply to Respondent's  
2 Objection for Further Discovery and Request to Strike New Claims, 5, Docket No. 24).  
3 4.) Liebb's Request for Judicial Notice (Docket No. 24)

4 Liebb asks the Court to take judicial notice of the discovery in two petitions he  
5 provides as exhibits within his motion. (Petitioner's Reply to Respondent's Objection for  
6 Further Discovery and Request to Strike New Claims, 4, Docket No. 24). Respondent  
7 objects claiming documents are irrelevant to this action. (Respondent's Objection to  
8 Petitioner's Request for Judicial Notice, Docket No. 25). Liebb filed a reply asserting that  
9 the discovery compilations are relevant.

10 Judicial notice is governed by Rule 201 of the Federal Rules of Evidence. Fed. R.  
11 Evid. 201. It allows the court to take notice of 'adjudicative' facts which are not subject to  
12 reasonable dispute but are either: 1) generally known within the territorial jurisdiction of the  
13 trial court or 2) capable of accurate and ready determination by resort to sources whose  
14 accuracy cannot reasonably be questioned. *Id.* at 201(a-b). A court must take judicial  
15 notice if it is requested by a party and supplied with the necessary information. *Id.* at  
16 201(d). Judicial notice may also be taken at any stage in the proceedings. *Id.*

17 In the case at bar, Liebb requests the Court to take judicial notice of the discovery  
18 from two habeas proceedings in the Superior Court for the County of Santa Clara. Liebb  
19 attaches the discovery to his motion as Exhibits A and B. Exhibit A concerns the petition  
20 of, *In re Donnell E. Jameison*, and includes the petitioner's compilation and analysis of a  
21 court discovery order and a declaration in support of the compilation from the petitioner's  
22 lawyer. Exhibit B concerns the petition of, *In re Viet Mike Ngo*, and includes a declaration  
23 in support of the petitioner's traverse and an analysis of transcripts produced in compliance  
24 with the court's discovery order.

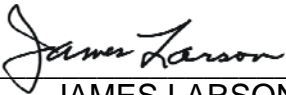
25 This Court concludes that Liebb's motion to take judicial notice of these two  
26 California Superior Court, County of Santa Clara habeas petitions should be denied without  
27 prejudice. It is not clear to the Court whether they are true and accurate copies or that they  
28 are official documents filed in these unrelated petitions. Liebb has failed to provide any  
evidence of authenticity, such as a Clerk stamp or evidence of service. Since knowledge of  
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1 these documents is neither 1) generally known within the territorial jurisdiction of this Court  
2 nor 2) capable of accurate and ready determination by this Court, judicial notice is not  
3 appropriate. Liebb has failed to establish the universality of these documents, therefore  
4 this Court denies his request for judicial notice.

5 **Conclusion**

6 The Court denies the following four motions: 1) Respondent's Objection to the  
7 Discovery Order (Docket No. 19), 2) Liebb's Request for Additional Time to Supplement the  
8 Record and Request for Additional Discovery (Docket No. 20), 3) Respondent's Request to  
9 Strike New Claims (Docket No. 23), and 4) Liebb's Request for Judicial Notice (Docket No.  
10 24).

11  
12 DATED: September 21, 2007

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15 JAMES LARSON  
16 Chief Magistrate Judge  
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